

IN THE COURT OF APPEAL OF TANZANIA

AT BUKOBA

(CORAM: MWARIJA, J.A., SEHEL, J.A And MAIGE, J.A)

CIVIL APPLICATION NO. 381/04 OF 2020

**SHAMSI SAID BYARUSHENGO (as the Legal
representative of LUTTU SAID BYARUSHENGO)APPLICANT**

VERSUS

ABDU HASSAN BAKUZA.....RESPONDENT

**(Application to strike out a notice of appeal against the judgment of the High
Court of Tanzania at Bukoba)**

(Rumanyika, J.)

dated 10th day of May, 2018

in

Land Case No. 32 of 2015

.....

RULING OF THE COURT

19th & 22nd July, 2022

MAIGE J.A.:

In this application, the Court is being moved under rule 89(2) of the Tanzania Court of Appeal Rules, 2009 (the Rules), to strike out the Notice of Appeal lodged by the respondent on 24th day of May 2018 to challenge the decision of the High Court of Tanzania at Bukoba (Rumanyika, J.) dated 10th May, 2018. The application is supported by the affidavit of the applicant which has not been opposed by an affidavit in reply from the

respondent. The grounds of the application according to the notice of motion are as follows;

- " (a) *The respondent has failed to take essential steps to lodge the intended appeal.*
- (b) *The respondent has failed to institute the intended appeal within sixty (60) days counted from the date of lodging the notice of appeal as prescribed under Rule 90 (1) of the Tanzania Court of Appeal Rules, 2009 as amended.*

The factual backgrounds giving raise to the application is easy to narrate. The applicant procured a judgment and decree of the District Land and Housing Tribunal of Bukoba as against the respondent declaring him the lawful owner of the suit property. The respondent unsuccessfully appealed to the High Court of Bukoba. Once again aggrieved, the respondent lodged on 28th May, 2018 a Notice of Appeal expressing his desire to further appeal to the Court. The notice of appeal was served on the applicant on 1st August, 2020. The applicant was however, not served with any letter signifying that, the respondent had ever applied, to the Registrar of the High Court for a copy of the proceedings necessary for his intended appeal. Believing that the respondent has not taken necessary steps within the prescribed time, the applicant has initiated the instant motion.

At the hearing, the applicant was represented by Mr. Hamza Byarushengo, learned advocate who was holding the brief for Mr. Juma Nassoro, also learned advocate of course, with full instructions to proceed. The respondent despite being duly served did not enter appearance. Neither did he file any written submissions. In the circumstance, the matter proceeded in his absence in terms of rule 63(2) of the Rules.

Before the commencement of the hearing, Mr. Byarushengo informed the Court that, the applicant expired on 20.3.2021 and that; on 12th July, 2021, Shamsi Said Byarushengo was appointed, by the Primary Court of Katoro, as the administrator of his estate. The counsel, having supplied us with copies of the letters of administration and death certificate, prayed, which we granted, the said Shamsi Said Byarushengo be made a party in the place of the applicant.

In his brief oral submissions, Mr. Byarushengo had no much to say than adopting the contents of the notice of motion, affidavit and written submissions which had earlier on been filed and prayed that the application be granted with costs.

We have considered the notice of motion, the unopposed affidavit and written submissions in support of the motion. We are, for the reasons we are going to assign, satisfied that, the application is with merit.

The application, as we have stated above, is preferred under rule 89(2) of the Rules which, in our reading, allows a person on whom a notice of appeal has been served or ought to have been served, to apply to the Court for the respective notice to be struck out on the grounds, among others that, some essential steps in the proceedings have not been taken at all or taken beyond the prescribed time.

In this application, the notice of appeal was lodged on 28th May, 2018. In accordance with rule 84(1) of the Rules, it was to be served on the applicant within 14 days from the date when it was lodged. According to the irrefutable facts in the affidavit, the notice was served on the applicant on the 1st day of August, 2020. There is a difference of more than two years in between. The respondent has not procured any order of the Court extending time for the service of the same. In the circumstance, the notice was served out of the prescribed time. This, no doubt, amounts to a failure to take an essential step within the meaning of rule 89(2) of the rules. See for instance, **Salvand K. Rwegasira v. China Henan International Co-Operation group CO. LTD**, Civil application No.114 of 2005 at Dar es Salaam (unreported).

As that is not enough, under rule 90(1) of the Rules, an intended appeal has to be instituted within 60 days from the date of the notice. In here, despite expiry of more than two years, no record of appeal has been

instituted. The respondent would have, in terms of the proviso to the sub-rule just referred, been entitled to exclusion of the period spent in preparation of the record. However, as rightly submitted for the applicant, for the reason of failure to serve the request letter, if any, to the applicant, the respondent cannot enjoy the said exception. This is in accordance with sub-rule (3) of rule 90 which provides as follows;

"An appellant shall not be entitled to rely on the exception to sub-rule (1) unless his application for the copy was in writing and a copy of it was served on the Respondent."

We have had an opportunity to consider more or less a similar issue in the case of **Paul Mgana v. The managing Director Tanzania Coffee Board**, Civil Appeal No. 82 of 2001 (unreported) where we observed, as we hereby do, as follows;

"In this case, the letter of 19.6.2000, to the Registrar is of no avail to the appellant for the reason that it was not copied to the respondent. Furthermore, there is no evidence to support the appellant's claim that a copy of the letter was served on the respondent. In that case, as the appellant is not entitled to take advantage of the exception to sub-rule (1) of Rule 83, the appeal should have been instituted within 60 days from 14.6.2000, when the notice of appeal was lodged."

It is for the foregoing reasons that, we find the application with merit and grant it accordingly. As a result, the Notice of Appeal lodged on 24th day of May, 2018 expressing the respondent's intention to appeal against the decision of the High Court herein mentioned, is hereby struck out with costs.

Ordered accordingly.

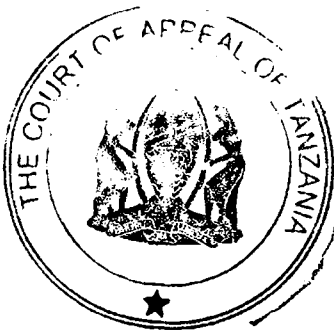
DATED at BUKOBA this 21st day of July, 2022.

A. G. MWARIJA
JUSTICE OF APPEAL

B. M. A. SEHEL
JUSTICE OF APPEAL

I. J. MAIGE
JUSTICE OF APPEAL

The Ruling delivered this 22nd day of July, 2022 in the presence of Applicant and Respondent in person, is hereby certified as a true copy of the original.



M. A. Amworo
O. A. Amworo
DEPUTY REGISTRAR
COURT OF APPEAL